

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7647
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TELEPHONE (212) 973-0111
FACSIMILE (212) 891-9598

December 8, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

Alpheus Communications, LP ("Alpheus") submits this letter to supplement its previous letter opposing the Commission's proposal to apply EEL eligibility criteria to stand-alone UNE loops.¹ Alpheus provides wholesale broadband transport services in Texas, deploying and operating a state-of-the-art, protocol agnostic network that enables its carrier customers to provide converged and secure services to Texas businesses and consumers.

Applying EEL Criteria to Stand-Alone UNE Loops Would Undermine Development of Wholesale Telecommunications Markets

Apart from the facts, as previously noted in this proceeding by Alpheus and others, that application of EEL criteria to stand-alone loops would harm facilities-based competition, and be unlawful and totally unnecessary,² Alpheus stresses that this step would also harm the wholesale market for local telecommunications services. Alpheus uses unbundled access to network elements to provide telecommunications services on a wholesale basis to other carriers. Alpheus' customers, in turn, many of whom provide local voice service, use Alpheus' products to offer business and consumers innovative services at competitive prices. These customers rely on Alpheus sophisticated OSS and skilled personnel to navigate the process of ordering and

¹ See Letter from Alpheus Communications, LP *et al.*, to M. Dortch, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (Nov. 18, 2004).

² See Letter from Alpheus Communications, LP *et al.*, to M. Dortch, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (Nov. 18, 2004). See also Letter from New Edge Network, Inc. to M. Dortch, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (Dec. 7, 2004).

provisioning UNE loops from SBC in Texas. Alpheus can then integrate these loops with Alpheus' transport network to deliver to the carrier customer a seamless point-to-point circuit.

However, Alpheus does not itself directly offer "voice" services, and thus has no need for interconnection trunks with ILECs, which are used for the exchange of voice traffic. Nor does Alpheus connect loops to voice grade switches although its customers may do so. Thus, application of EEL criteria to stand-alone loops without modification or refinement could seriously harm Alpheus ability to provide wholesale service. This could, in turn, likely lead to wholesale carriers exiting the market.³ This result would obviously lead to diminished consumer choices and options and disserve the public interest. Accordingly, in addition to all the previous reasons provided by Alpheus and others, the Commission should not take the improvident step of applying EEL criteria to stand-alone loops because this would harm the wholesale market for local telecommunications services.

A Wholesaler Exemption Should Be Established

Should the Commission erroneously determine that EEL eligibility criteria should be applied to stand-alone loops, the Commission should establish an exemption or "carve-out" for wholesale service providers in order to assure that an efficient and viable market for wholesale services can emerge. More specifically, the Commission should establish that wholesalers may obtain stand-alone loops based upon certification by the requesting carrier that (1) it will use the UNE in the provision of wholesale telecommunications services and (2) to best of the requesting carrier's information and belief, the carrier's customer complies with eligibility requirements permitting use of stand-alone loops for data services, *i.e.* with a data carve-out, as described below. Anything short of this step would seriously harm the wholesale market.

An Exemption is Necessary for Data Services

Alpheus also strongly supports a carve-out for provision of data services should the Commission apply EEL eligibility criteria to stand-alone UNE loops. Alpheus and others have explained to the Commission that applying EEL criteria to stand-alone loops would have a devastating impact on CLECs, many of whom are Alpheus customers, that provide data services.⁴ To implement such an exemption, Alpheus supports Covad Communication's recent proposal (set forth in Covad's letter of November 19, 2004)⁵ that suggests alternative eligibility criteria for data services.⁶ Such criteria could help avoid the harmful effects of applying EEL criteria to stand-alone loops

³ See, e.g., Letter from P. Goyal, Covad Communications to M. Carey, FCC, CC Docket Nos. 01-338, 96-98, and 98-147, (Jan. 21, 2003).

⁴ cites

⁵ See Letter from P. Goyal, Covad Communications Company to M. Dortch, FCC, WC Docket Nos. 04-313 and 01-338 (Nov. 24, 2004).

⁶ Under Covad's proposal, the requesting CLEC would certify that:

For all new high-capacity loop facilities ordered under an interconnection arrangement established pursuant to new eligibility criteria adopted by the

While the foregoing exemption could go a long way towards ameliorating the harmful impact on CLECs of applying EEL criteria to stand-alone loops, a more important overarching point, however, is that it would be unwise and unnecessary for the Commission to so impose EEL eligibility criteria on stand alone UNE loops, especially given the accelerated time frame under which the Commission is working. The Notice of Proposed Rulemaking in this proceeding did not specifically raise this issue and as a consequence, the record in this proceeding lacks any significant discussion or debate concerning a need to apply EEL criteria to stand-alone UNE loops.⁷ Although several RBOCs have casually requested that the Commission undertake this action, none have provided any significant discussion on the issue nor have any provided any adequate reasoning on how the Commission could lawfully adopt such a step without also unquestionably increasing the likelihood of court review.⁸ Alpheus is also concerned that any carve-outs might provide an opportunity for gamesmanship by ILECs. The proposed restrictions are also unnecessary because the Commission's rules in the *TRO* affirmed in *USTA II* already contain a significant restriction on IXCs' ability to use UNE loops to bypass special access; the application of EEL restrictions to commingled combinations of loop and special access service in 47 C.F.R. § 51.318(b).

Because there is no record to support applying EELs to stand-alone loops, or any other evidence showing a need to apply restrictions to use of stand-alone loops, the Commission should at most at this point announce an intention to obtain further comment on the issue rather than adopting any such requirements at this time.

Commission for high-capacity loop facilities (including EELs, DS-1 UNE loops and DS-3 UNE loops), requesting carriers could self-certify that they meet the following requirements:

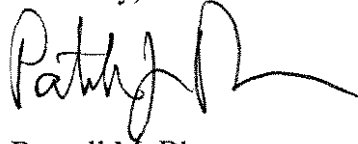
- (1) That the requesting carrier will provide a data telecommunications service over the requested facilities;
- (2) That the requesting carrier will not solely provide interexchange voice telecommunications service interconnected with the Public Switched Telephone Network over the requested facilities; and
- (3) That the requested facilities will terminate in a central office collocation arrangement.

Id.

⁷ See *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988) (clarifying that the Commission must provide proper notice of a proposed rulemaking that is "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process"); *MCI Telecommunications v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995) (vacating and remanding FCC rules due to inadequate notice under the Administrative Procedure Act as clarified by *Florida Power*); *Sprint v. FCC*, 315 F.3d 369, 374 (D.C. Cir. Jan 21, 2003) (stating that the Commission must use the notice-and-comment procedures set forth in the Administrative Procedure Act before making "substantive changes in prior regulations.").

⁸ See Verizon Comments at 78-79; SBC Comments 97-98. See also *TRO*, ¶¶ 590-611; 47 C.F.R. § 51.318

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick J. Donovan", with a stylized flourish at the end.

Russell M. Blau
Patrick J. Donovan
Joshua M. Bobeck

Attorneys for ALPHEUS COMMUNICATIONS, L.P.

cc: Honorable Michael K. Powell
Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
Christopher Libertelli
Matthew Brill
Jessica Rosenworcel
Daniel Gonzalez
Scott Bergmann
Jeffrey Carlisle
Michelle Carey
Thomas Navin
Jeremy Miller
Russell Hanser
Pamela Arluk
Carol Simpson
Tim Stelzig
Ian Dillner
Marcus Maher
Gail Cohen
John Stanley
Christopher Killion
Cathy Zima
Erin Boone